Supreme Court, U.S.
FILED
MAR 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1408

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PEARLIE MAI HAYNIE, and her counsel,
AVON N. WILLIAMS, JR., ESQUIRE,
Petitioners,

v.

ROSS-GEAR DIVISION OF TRW, INC. and
UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA, LOCAL 342,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

MARK ALLEN
LYNN AGEE
Counsel of Record
GERBER, GERBER & AGEE
7th Floor, 65 Union Avenue
Memphis, Tennessee 38103
(901) 523-0019

JORDEN ROSSEN
NANCY SCHIFFER
UAW LEGAL DEPARTMENT
8000 East Jefferson Avenue
Detroit, Michigan 48214
Attorneys for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
REASONS WHY THE WRIT SHOULD BE DENIED	1
I. The Decision Below Is In Conformity With This Court's Decision In *Roadway Express v. Piper*, 447 U.S. 752 (1980)	1
II. The Decision Below Adopts The Prevailing Rule On Imposing Sanctions Against Attorneys Under 28 U.S.C. § 1927	4
III. The Decision Below Does Not Conflict With Counsel's Ability To Comply With The Code Of Professional Responsibility, Nor Is It A Matter Of National Importance	7
CONCLUSION	8
APPENDIX	1a

TABLE OF AUTHORITIES

CASES: Page

Blair v. Shenandoah Women's Center, Inc., 757 F.2d 1435, 1436 (4th Cir. 1985) 5
In Re: Oximetrix, Inc., 748 F.2d 637 (Fed. Cir. 1984) 6
Jones v. Continental Corp., 789 F.2d 1225 (6th Cir. 1986) 3, 4
Lewis v. Brown & Root, Inc., 711 F.2d 1287, 1289, 1292 (5th Cir. 1983) 3
Limerick v. Greenwald, 749 F.2d 97 (1st Cir. 1984) 5
McConnel v. Shurak, 774 F.2d 746 (7th Cir. 1985) .. 4
Morris v. Adams Millis Corp., 758 F.2d 1372 (10th Cir. 1985) 6
Roadway Express v. Piper, 447 U.S. 752 (1980) ....*passim*
Sturgeon v. Airborne Freight Corp., 778 F.2d 1154 (5th Cir. 1985) 6
Tedeschi v. Barney, 757 F.2d 465 (2nd Cir. 1985) .. 5
Tooms v. Leone, 777 F.2d 465, 471 (9th Cir. 1985) .. 4
Trecker v. Scag, 747 F.2d 1176 (7th Cir. 1984) 5
United States v. Blodgett, 709 F.2d 708 (9th Cir. 1983) 4

STATUTES:

28 U.S.C. § 1927 ..... 7, 8
42 U.S.C. § 1988 2
42 U.S.C. § 2000(e)-5(k) 2

CODE OF PROFESSIONAL RESPONSIBILITY:

Ethical Consideration 7-1 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1408

PEARLIE MAI HAYNIE, and her counsel,
AVON N. WILLIAMS, JR., ESQUIRE,
Petitioners,

v.

ROSS-GEAR DIVISION OF TRW, INC. and
UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA, LOCAL 342,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 342, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking to review the Sixth Circuit's opinion in this case. That opinion is reported at 799 F.2d 237.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Decision Below Is In Conformity With This Court's Decision In *Roadway Express v. Piper*, 447 U.S. 752 (1980).

Petitioner contends that the decision of the Sixth Circuit in this case assessing attorney's fees under 28 U.S.C. § 1927 is contrary to this Court's decision in *Roadway Express v. Piper*, 447 U.S. 752 (1980) for the reason

that *Roadway* required a showing of bad faith. Respondent contends that this reading of *Roadway* is erroneous.

The *Roadway* decision involved the issue of whether or not a court could assess attorney's fees against counsel under 28 U.S.C. § 1927 (as it was worded in 1980) or under the inherent powers of the Court. The Court found that § 1927 only allowed the assessment of excess costs against an attorney who acted unreasonably and vexatiously and that attorney's fees were not authorized as "costs" under § 1927 as it then existed. Further, the Court found that neither the attorney's fees provision available to prevailing parties under 42 U.S.C. § 1988 nor 42 U.S.C. § 2000(e)-5(k) changed this result.

After making the finding that only excess costs were allowable under § 1927 rather than attorney's fees, this Court then considered whether a court could assess attorney's fees as a sanction against recalcitrant counsel under the Court's inherent powers. The Court found that it could award attorney's fees under its inherent powers where there was a showing that counsel's conduct "constituted or was tantamount to bad faith." *Roadway Express, Inc., supra,* 447 U.S. at 767. Since the Court below in *Roadway* had not made a specific finding that counsel's conduct constituted bad faith, this Court remanded the case to the District Court for a decision on that issue. However, this Court affirmed the award of costs under the then existing 28 U.S.C. § 1927, admittedly, in the absence of a specific finding of bad faith.

Following petitioner's argument to its logical conclusion would result in a finding that bad faith is required to assess attorney's fees against counsel under § 1927 though the words "bad faith" do not appear in the statute. Section 1927 allows the court to assess attorney's fees against a counsel who "multiplies the proceedings in any case unreasonably and vexaciously . . ."

Contrary to petitioner's assertions, we have been unable to locate anywhere in the Sixth Circuit's Opinion where the Sixth Circuit indicated that petitioner had "negligently" pursued claims that he should know are frivolous. A reading of the Opinion indicates that the Sixth Circuit merely found that where an attorney pursues claims that he should know are frivolous, his conduct multiplies the proceedings unreasonably and vexaciously.

Petitioner painfully attempts to distinguish *Jones v. Continental Corp.*, 789 F.2d 1225 (6th Cir. 1986) (relied upon by the Court below as authority for assessing attorney's fees under 28 U.S.C. § 1927). In doing so, petitioner admits that the September, 1980 Amendments to § 1927 were for the sole purpose of authorizing the assessment of attorney's fees. This is precisely what the *Jones* case meant when it held:

> The effect of the amendment was to nullify that part of *Roadway Express* which held that former § 1927 permitted assessment against losing attorneys only of 'costs', not of attorney's fees, thus adding a statutory power to the 'inherent power' recognized in *Roadway Express*. [Citations omitted].

789 F.2d at 1229. Since *Roadway* refused to grant attorney's fees as costs under the then existing § 1927, approximately three months after the issuance of the *Roadway* decision Congress amended § 1927 to allow for the assessment of attorney's fees.[1] Respondent contends

---

[1] The legislative history makes clear that the September 12, 1980 amendment was intended to "expand [] the category of expenses the judge might require an attorney to satisfy personally to include '. . . attorneys' fees.'" Joint Explanatory Statement of the Committee of Conference, 96th Cong., 2d Sess. of reprinted in 1980 U.S. Code Cong. & Ad. News 2781, 2782; see also, *Lewis v. Brown & Root, Inc.*, 711 F.2d 1287, 1289, 1292 (5th Cir. 1983) (upholding award of attorneys' fees under § 1927 against plaintiff and his attorney jointly and severally), *cert. denied*, —— U.S. ——, 104 S.Ct. 975, 79 L.Ed.2d 213 (1984), *modified* 722 F.2d 209 (per curiam) (remanding for trial court to determine whether

that the Sixth Circuit's decision in *Jones* was logical and correct in light of the *Roadway* decision's affirmance of the attorney's fee award under 28 U.S.C. § 1927.

II. The Decision Below Adopts The Prevailing Rule On Imposing Sanctions Against Attorneys Under 28 U.S.C. § 1927.

Petitioner contends that the decision below conflicts with Courts of Appeals of other circuits which allegedly require a showing of bad faith before an attorney can be sanctioned under 28 U.S.C. § 1927. However, the cases cited in petitioner's argument only evidence one circuit which definitely requires a bad faith showing for assessment of attorney's fees under § 1927 and one other circuit which equates frivolous filings with bad faith conduct.

In *United States v. Blodgett*, 709 F.2d 708 (9th Cir. 1983), the issue before the Ninth Circuit was under what circumstances could the court impose monetary sanctions on an attorney for filing a frivolous appeal. The Court found that the imposition of sanctions under 28 U.S.C. § 1927 required a finding that counsel acted recklessly or in bad faith. This position of the Ninth Circuit was reconfirmed in *Tooms v. Leone*, 777 F.2d 465, 471 (9th Cir. 1985).

The Seventh Circuit has also adopted a bad faith standard for assessing attorney's fees against counsel under § 1927. In *McConnell v. Shurak*, 774 F.2d 746 (7th Cir. 1985), the Court held that in order to assess attorney's fees for a frivolous appeal under Rule 38 or § 1927, the Court must first determine whether the appeal was frivolous and then whether the appellant's counsel's persistence in pursuing the litigation is itself

---

attorneys' fees for entire proceeding or just a portion of it should be awarded); *cert. denied*, —— U.S. ——, 104 S.Ct. 2690, 81 L.Ed.2d 884 (1984).

evidence of bad faith. The *McConnell* decision relied on *Trecker v. Scag*, 747 F.2d 1176 (7th Cir. 1984), cert. den., —— U.S. ——, 105 Sup.Ct. 2140, 85 L.E.D. 2d 498 (1985). However, it is interesting to note that the Court in *Trecker, supra,* found that persistence in the litigation is itself evidence of bad faith. Therefore, respondent contends that although the standard in the Seventh Circuit may require a finding of bad faith for assessment of attorney's fees against counsel under § 1927, the standard for determining bad faith is extremely low since mere persistence in the frivolous litigation, itself, may be evidence of bad faith.

Several of those cases cited by petitioner for the prop osition that bad faith is required to assess attorney's fees under § 1927 simply do not stand for this proposition. In *Limerick v. Greenwald*, 749 F.2d 97, 101-102 (1st Cir. 1984), the Court held that the manner in which counsel conducted the appeal so unreasonably multiplied the proceedings as to justify the imposition of attorney's fees against them personally. There was no mention in the decision of the requirement of a finding of bad faith.

In *Blair v. Shenandoah Women's Center, Inc.*, 757 F.2d 1435, 1436 (4th Cir. 1985), although the Court found that plaintiff's counsel had engaged in subjective bad faith conduct, the decision does not require a finding of subjective bad faith conduct under 28 U.S.C. § 1927. Moreover, the Court refused to disturb the District Court's finding that it "has inherent power to assess attorney's fees against an attorney, which power is not limited to cases filed in bad faith, but includes actions leading to the filing of suit and includes conduct during the course of litigation." See, 757 F.2d at 1436.

Petitioner also cites *Tedeschi v. Barney*, 757 F.2d 465 (2d Cir. 1985). The Second Circuit in *Tedeschi* affirmed the decision of the District Court finding that counsel had engaged in bad faith conduct. Although defendants

moved for attorney fees under Rule 11, Fed.R.Civ.P., § 1927 and the inherent equitable powers of the Court, the District Court had previously found bad faith. The Second Circuit merely recited the inherent powers rule addressed in *Roadway* and did not address the issue of bad faith under 28 U.S.C. § 1927.

In *Morris v. Adams Millis Corp.*, 758 F.2d 1352 (10th Cir. 1985), although the Court found that plaintiff's counsel had engaged in bad faith conduct, the Court noted at footnote 7 of the Opinion (see, 758 F.2d at 1357, note 7) that it is well-established that courts have the inherent power to impose sanctions on both litigants and attorneys to, *inter alia*, deter frivolous filings. The Tenth Circuit read *Roadway, supra*, to hold that "*apart from § 1927*, the Federal Courts have the inherent power to award attorney fees against counsel personally when the Court has found that the attorney acted in bad faith." [Emphasis added]. 758 F.2d at 1358, note 7.

In *In Re: Oximetrix, Inc.*, 748 F.2d 637 (Fed.Cir. 1984), the Federal Circuit, in assessing attorney's fees against plaintiff's counsel under 28 U.S.C. § 1927, found that plaintiff never had a basis for removal and that competent counsel would have not possibly failed to recognize this fact. The Court further found that plaintiff's petition for mandamus was frivolous and interposed for the purpose of delay. As a result of this finding, the Court assessed attorney's fees jointly and severally against plaintiff and counsel. The words, "bad faith," were not mentioned in the decision.

Finally, petitioner cites *Sturgeon v. Airborne Freight Corp.*, 778 F.2d 1154 (5th Cir. 1985) for the proposition that bad faith is required to impose § 1927 sanctions. However, the Court in *Sturgeon* reasoned that sanctions on appeal are assessed "when the claim advanced is unreasonable, or is not brought with a reasonable good faith belief that it is justified. An appeal is frivolous when it

involves legal points that are not arguable on their merits." 778 F.2d 1161-1171. The Court adopted an "unreasonable and unjustified" standard rather than a "bad faith" standard.

In summation, we read only one and possibly two Circuit Courts of Appeals to require a bad faith finding for the assessment of attorney fees under § 1927. We have been unable to locate any other circuits requiring a finding of bad faith over and above the plain statutory language which merely requires a showing of unreasonableness and vexaciousness.

III. The Decision Below Does Not Conflict With Counsel's Ability To Comply With The Code Of Professional Responsibility, Nor Is It A Matter Of National Importance.

Petitioner submits that the Code of Professional Responsibility required him to "represent his client zealously within the bounds of law." Ethical Consideration 7-1. Although Ethical Consideration 7-1 requires an attorney to represent his client zealously, the section qualifies this zealous representation by requiring that the representation be "within the bounds of the law." Therefore, respondent contends that once petitioner's conduct contravened 28 U.S.C. § 1927 (a federal statute), it ceased to be zealous representation and became outside of the bounds of law. Since the Court below found that plaintiff's case was frivolous and that plaintiff's counsel knew or should have known this fact, his conduct in pursuing this case was outside of the bounds of law.

Finally, respondent contends that 28 U.S.C. § 1927 is a provision which was enacted to allow courts to govern the conduct of attorneys practicing before them. It is difficult to imagine how this Court could set a standard governing conduct under that statute which would be clearer than the plain meaning of the statute. Respondent contends that Courts in the Sixth Circuit should be able

to control members of their bar who should be aware of the standards of conduct within their Circuit. Therefore, a uniform or national decision regarding 28 U.S.C. § 1927, we think, is unnecessary given the need for courts to control their own attorneys, the unambiguous language of the statute, and the variety of fact patterns which can only be determined on a case by case basis.

CONCLUSION

For these reasons, the Petition for Writ of Certorari should be denied.

Respectfully submitted,

MARK ALLEN
LYNN AGEE
Counsel of Record
GERBER, GERBER & AGEE
7th Floor, 65 Union Avenue
Memphis, Tennessee 38103
(901) 523-0019

JORDEN ROSSEN
NANCY SCHIFFER
UAW LEGAL DEPARTMENT
8000 East Jefferson Avenue
Detroit, Michigan 48214
Attorneys for Respondents

APPENDIX

STATUTES INVOLVED

1. 28 U.S.C., Section 1927 (1948).

Counsel's Liability for Excessive Costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the Court to satisfy personally such excess costs.

2. 28 U.S.C., Section 1927 (1980).

Counsel's Liability for Excessive Costs

Any attorney or other persons admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.